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IN THE
Supreme Court of the United States

FANNE LU YAFFE,

Petitioner,

v.

JOE ADAMS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS, DIVISION NO. III
OF THE STATE OF OKLAHOMA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether denial of Petitioner's Creditor's Claim in probate proceeding was a denial of her due process right guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Whether Oklahoma Statute Title 58 Section 741 is un-constitutional and in violation of Article 2, Section 7 of the Constitution of the State of Oklahoma as well as violating the Due Process clause of the United States Constitution.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Court of Civil Appeals of the State of Oklahoma and denial of certiorari by the Supreme Court of the State of Oklahoma.

OPINIONS BELOW

The unpublished opinion of the Court of Civil Appeals of the State of Oklahoma is attached hereto as Appendix A.

The unpublished order of the Muskogee County District Court of the State of Oklahoma is attached hereto as Appendix B.

The Court Minute of the Muskogee County District Court of the State of Oklahoma is attached hereto as Appendix C.

The order of the Supreme Court of the State of Oklahoma denying certiorari is attached hereto as Appendix D.

The order of the Supreme Court of the State of Oklahoma declining to publish opinion is attached hereto as Appendix E.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

Since Oklahoma Statute Title 58, Section 741 may be unconstitutional, notification required by Rule 29.4(c) has been complied with.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution. U.S.C.A. Const. Amend. 14, Article 2, Section 7 of the Constitution of the State of Oklahoma and Oklahoma Statute Title 58, Section 741.

The Fourteenth Amendment states in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 7, Section 2 of the Constitution of the State of Oklahoma states:

> No person shall be deprived of life, liberty, or property, without due process of law.

Oklahoma Statute Title 58, Section 741 states as follows:

> When the order or decree appointing an executor, or administrator or guardian, is reversed on appeal for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate, performed by such executor, or administrator or guardian, if he has qualified, are as valid as if such order or decree had been affirmed.

STATEMENT OF THE CASE

This case began as a "will contest" between Joe Adams (Adams), nephew of the decedent and Frank Fulton (Fulton), cousin of the decedent. Petitioner herein was attorney for the decedent, Mildred Franklin (Franklin), in a guardianship proceeding prior to her death wherein Adams and Fulton both petitioned for guardianship. Franklin hired petitioner to assure that Fulton would become her guardian. Petitioner seeks attorney fees for services rendered decedent prior to her death.

A. FACTUAL HISTORY OF THE CASE

During the first week in July 1997 Adams hired Bart Fite (Fite) to represent him in the guardianship issue. On July 7 and July 9, 1997, petitioner (Franklin's attorney), had relevant phone conferences with Fite concerning the guardianship of Franklin. Additionally, petitioner and Fite met with the District Court Judge in chambers on July 11, 1997 concerning the issue of guardianship. Furthermore, both attorneys had a conference in Judge's chambers on August 1, 1997 at which time and with both attorneys present, the Judge called an attorney in California to inquire as to California proceedings concerning the guardianship. During the phone conferences and meetings with the Judge, petitioner and Fite were both present and Fite was well aware the petitioner represented Franklin.

Franklin died August 2, 1997. After her death and after the ensuing will contest,[1] the District Court admitted the Adams will to probate on April 14, 1998 over the objection

1. The hearing of the will contest was not transcribed.

of Fulton who presented a later will. Fulton filed a Petition in Error on May 8, 1998 timely appealing the decision.

On April 27, 1998, before the appeal time had run, Adams filed a Notice to Creditors and Certificate of Non-Mailing stating "there were no known creditors" so personal notice was not required. On April 30 and May 7, 1998, said notice was published in the Haskell News, a small, county newspaper with minimum circulation.

Although petitioner's representation of the decedent was known to Adams, no actual notice to file creditor's claim was given to petitioner. Unaware that a Notice to Creditors had been filed and concentrating on her appeal, petitioner was not alerted to file a creditor's claim at that time.

On appeal from the decision to admit Adams will to probate, the Court of Appeals partly reversed the District Court and disallowed both Wills. App. A at 2a. On February 17, 1999, Adams filed a petition to be appointed administrator of the now intestate estate. Notice of the hearing for appointment of administrator was sent to petitioner. On March 4, 1999, Adams was appointed administrator.

Adams filed no additional notice to creditors after being appointed administrator and petitioner still did not receive notice to file claims. However, without receiving actual notice and with no notice filed, petitioner filed her creditor's claim on March 8, 1999 since she was aware of March 4th hearing. After receiving no response from Adams within the statutory time, petitioner, pursuant to statute[2], assumed her claim was rejected.

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2. Title 58 O.S. § 337 states in pertinent part "When a claim is presented . . . If the personal representative refuses or neglects to endorse or reject for 30 days . . . such refusal or neglect is equivalent to a rejection . . ."

Adams filed a Notice of Final Accounting on May 17, 1999. In response, Appellant filed an objection to the final accounting as well as an Ancillary Petition requesting attorney fees for services rendered decedent.

On June 16, 1999, Appellant's Ancillary Petition was heard simultaneously with the hearing of the Motion to Allow Final Accounting.[3] At said hearing the court allowed the final account but denied the request for attorney's fees stating that "the Notice to Creditors was valid and effective and the claim of Ms. Yaffe is barred." App. C at 9a.

Petitioner filed a timely Motion to Reconsider alleging denial of her due process rights of notice and a chance to be heard. The Court took the matter under advisement and, on September 17, 1999, issued an Order stating that "the Motion to Reconsider be denied." App. B at 6a.

B. PROCEEDINGS BELOW

After the District Court denied attorney fees, petitioner filed an appeal with the Supreme Court of the State of Oklahoma.

The Supreme Court sent the case down to the Court of Civil Appeals which affirmed the District Court stating that ". . . the record is devoid of any evidence addressing the question of whether Adams had actual notice of Appellant's potential claim prior to the filing of the publication notice."[4]

3. The hearing of the final accounting was not transcribed.

4. Even though there was no transcription of the District Court hearing, the Court of Appeals knew from the appellate brief that the telephone and judicial conferences took place and were not rebutted in appellee's response.

Although the issue of lack of due process was again raised on appeal as well at District Court hearing, said issue was not addressed by the appellate court.

Petitioner then petitioned for a Writ of Certiorari to the nine member Supreme Court of the State of Oklahoma. She alleged denial of her due process rights of notice and a chance to be heard guaranteed by the *Fourteenth Amendment* to the United Stated Constitution. Certiorari was denied by a split decision of five to four. App. D at 10a.

Respondent filed an application to the Oklahoma Supreme Court asking it to publish its affirmation of the Civil Court of Appeals thus giving it precedential value. On November 6, 2000, the Court declined to do so. App. E at 11a. By implication, it said its decision was not necessarily the last word concerning the issue. Following the split decision of the Oklahoma Supreme Court, petitioner now asks the United States Supreme Court for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE QUESTIONS PRESENTED ARE IMPORTANT

It is important that state courts consistently adhere to the laws of the land as established by the United States Constitution as well as decisions handed down by the United States Supreme Court. In the present case, the Oklahoma courts violated those mandates. Four of the nine justices of the Oklahoma Supreme Court wished to uphold them. The other five did not.

The question of whether "publication notice" is sufficient to put creditors on notice keeps arising in Oklahoma.[5] Since this problem continues in Oklahoma courts, the courts should be sent a firm directive that they must apply due process proceedings to probate cases. Lower courts in the state must learn that publication notice is insufficient when one can be deprived of a property right which is protected by the *Fourteenth Amendment* to the United States Constitution as well as the Constitution of the State of Oklahoma.

If Certiorari is granted, perhaps this issue can finally be resolved in Oklahoma.

II.

THE DECISIONS OF THE APPELLATE COURTS OF OKLAHOMA CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT AND WITH THE UNITED STATES CONSTITUTION

The Supreme Court of the State of Oklahoma, in denying certiorari by a split decision of five to four, affirmed the Court of Civil Appeal's holding but did so by the slightest of margins. The Court of Civil Appeals simply stated that "the record is devoid of any evidence addressing the question of whether Adams had actual notice of Appellant's potential claim prior to the filing of the publication notice." This, of course, was an obvious and gross misstatement of fact as evidenced by the aforementioned phone calls and conferences[6] which were set out in petitioner's appellate brief and were not denied or controverted by appellee.

5. *Tulsa Collection Services v. Pope*, 485 U.S. 478 (1988) 108 S. Ct. 1340, 99 L. Ed. 2d 565, 808 P.2d 640 (Okla 1990).

6. The factual information concerning the phone conferences and meetings with the judge were included in the Petition to the appellate court.

Although the due process issue was raised on appeal to the appellate court, its holding did not address the question. It may have alluded to it when it stated that "operation of the nonclaims provisions results in the forfeiture of what might otherwise be meritorious claims."

The preeminent cases dealing with the issue of notice sufficient to satisfy due process and applicable to the present case are *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) and *Tulsa Collection Services v. Pope*, 485 U.S. 478 (1988), 108 S. Ct. 1340, 99 L. Ed. 2d 565, 808 P.2d 640 (Okla 1990). *Mullane* concerned trust funds and mandated that beneficiaries of the funds were entitled to actual personal notice of actions taken by the trustees when such actions might adversely affect their property rights.

Although the factual situation in *Mullane* is different from the present case, the issue of the right to be heard by the giving of proper notice is the same. They both question the constitutional sufficiency of notice by publication which might deprive one of a property interest without due process of law. As stated in *Mullane* citing *Milliken v. Meyer*, 311 U.S. 457 (1940)[7] and *Grannis v. Ordean*, 234 U.S. 385 (1914):[8]

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties

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7. Milliken concerned an oil interest and out-of-state parties and full faith and credit of the states.

8. Grannis concerned minor faults in notice i.e., misspelling of names and held that would not deny due process.

> of the pendency of the action and afford them an opportunity to present their objections.

The *Mullane* Court further held that "there is no doubt that the states have the power to determine the interests of all claimants provided its procedure accords full opportunity to appear and be heard." *Mullane* explained the Due Process Clause as follows:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

The U.S. Supreme Court asserted in *Mullane* that "notice must be reasonably calculated to inform interested parties of the pending action and of every critical state so as to afford them an opportunity to defend or to meet the issues at a meaningful time and in a meaningful manner." It further stated in pertinent part:

> That notice by publication is not sufficient under the Fourteenth Amendment as a basis for adjudication depriving of substantial property right of known persons whose whereabouts are also known, since it is not impracticable to make serious efforts to notify them at least by ordinary mail to their addresses on record with the trust company.

Pope followed the teachings of *Mullane* but applied them to probate proceedings. *Pope* places on the estate representative an affirmative duty to make reasonably diligent

efforts to identify creditors of the estate and to give them actual notice which would inform them of the time to file claims against the estate. In the present case, "reasonably diligent efforts" were not needed to identify this creditor as she was known by all parties and counsel. The facts support petitioner's right to have received actual, personal notice to file a creditor's claim and to receive attorney fees for legal services rendered the deceased prior to her death. The lack of notice, either in April 1998 or in March 1999 after respondent was appointed administrator and subsequent denial of attorney fees was clearly a violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

In *Pope*, which also originated in Oklahoma, the U.S. Supreme Court granted certiorari, reversed and remanded. It was held in *Pope* that:

> If appellant's identity as a creditor was known or "reasonably ascertainable" by appellee, the Due Process Clause of the Fourteenth Amendment requires that appellant be given notice by mail or such other means as is certain to ensure actual notice.
>
> Actual notice is a minimum constitutional pre-condition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.

Petitioner's name and address were well known. Adams' counsel and petitioner have practiced law in the same town

for many years. There is no doubt that respondent knew how to serve petitioner to give her personal notice. The present case is certainly one that has deprived petitioner of her property rights by failure to give notice and a chance to be heard.

The fact situation in *Pope* was analogous to the present case with the only difference being that *Pope* dealt with medical services rendered decedent prior to death and the present case deals with legal services.

In *Pope,* the hospital where deceased was housed prior to his death did not receive actual notice to creditors to file claims. The Court ruled that the administratrix knew or should have known that there would probably be unpaid hospital expenses. The Court further held that the hospital's due process right was violated because it did not receive its constitutional due of actual notice. Similarly, the administrator of the estate in the present case knew without a doubt that petitioner herein represented the decedent prior to her death. It follows that petitioner should have had actual notice in order to prevent deprivation of her due process right.

It is an uncontroverted fact that the petitioner provided legal services to decedent prior to her death. There is no doubt that respondent and the court were put on notice that petitioner represented the deceased. At the very least, they knew of the telephone conferences as well as the conferences in Judge's chambers prior to the filing of the first and only publication notice in April 1998. Therefore, petitioner had the constitutional right to actual, personal notice to file her claim in April 1998 at the time of first publication or, alternatively, on March 4, 1999 when Adams was appointed

administrator of the intestate estate. It is mandated by the Oklahoma Statutes[9] that:

> Every personal representative must, . . . file notice to creditors of the decedent . . . . The notice to the creditors shall be given . . . by mail to all known creditors of the decedent at their respective last-known available addresses . . .

Upon remand of *Pope* to the Oklahoma Supreme Court, Justice Marion Opala,[10] justice of the Oklahoma Supreme Court cited *Mullane* when he stated:

> Under Mullane and its progeny, one who seeks to alter another's legal rights must give actual notice to the latter before a court can act upon the claim. The estate representative must use due diligence to identify the decedent's potential creditors from all available sources at hand.

He further stated that "Appellant's claim is properly considered a property interest protected by the Clause" and:

> Satisfying creditors' substantial, practical need for actual notice in the probate setting is not so cumbersome or impracticable as to unduly burden the State's undeniable legitimate interest in the expeditious resolution of the proceedings, since mail service is inexpensive, efficient, and reasonably calculated to provide actual notice, . . .

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9. Title 58 O.S. § 331

10. Justice Opala was one of the four dissenters in the Oklahoma Supreme Court's denial of certiorari in the present case.

Additionally, Justice Opala stated that "No state may deprive a person of property without due process, commands the Fourteenth Amendment" U.S.C.A. Const. Amend. 14. In *Mullane*, it was held that "publication notice is insufficient to inform a known creditor that the latter's claim would be barred . . . unless filed within a statutory period" and further opined that publication notice was inadequate because "it is not reasonably calculated to reach those who could easily be informed by other means at hand." Justice Opala went on to state that actual notice is due all "known or easily ascertainable" parties and:

> In *Mullane's* aftermath the Court held that publication notice is insufficient to inform a known creditor that the latter's claim would be barred . . . unless filed within a statutory period. No state may deprive a person of property without due process, commands the *Fourteenth Amendment*.

In its June 16, 1999 Order Allowing Final Accounting of the intestate estate and denying attorney fees, the Court stated that "there was no known claim at that time" and that "no mailing was required because there was no known claim." This is grossly, patently inaccurate. Appellant was the attorney of record and was known by the personal representative, his attorney and the Court as representing the deceased prior to her death. They knew or should have known expenses were incurred. The estate is liable for claims arising before death.

The District Court's order and the appellate court's affirmation were contrary to established case law and in violation of constitutional as well as state statutory probate law.

The decisions below are in conflict with law established by this Court in *Pope* and *Mullane* as well as *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983)[11]. It denied petitioner her due process right to notice and a right to be heard where there is a possible loss of property. *Pope* is still good and valid law and must be followed here.

III.

THE OKLAHOMA STATUTE ALLOWING PUBLICATION NOTICE TO BE VALID WHILE AN APPEAL IS PENDING IS UNCONSTITUTIONAL

Since Adams filed the first notice before the appeal time had run and since the appellate decision partially reversed the District Court and disallowed both wills, petitioner maintains that the notice was premature, invalid and deceptive. However, said premature notice is apparently permitted by Oklahoma Statute which allowed the District Court to deny attorney fees based on Title 58 O.S. § 741 in reaching its decisions. Section 741 states as follows:

> When the order or decree appointing an executor, or administrator, or guardian, is reversed on appeal for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate, performed by such executor, or administrator or guardian, if he has qualified, are as valid as if such order or decree had been affirmed.[12]

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11. *Mennonite* held that whenever a party has a legally protected property interest, notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests . . . if the party's name and address are reasonably ascertainable."

12. Title 58 O.S. § 741.

Petitioner herein alleges above statute is unconstitutional and should be stricken from Oklahoma law. By its very nature, it has, among other problems, the potential to deprive one of the right of due process as evidenced by the case at bar. Petitioner herein is asking this Court to rule that the state statute is unconstitutional. The statute would make it necessary for creditors' to take the initiative to seek some kind of constructive notice that a creditor's claim had been filed.

The governing standard in *Pope* does not mandate that a creditor search the courthouse for filings to receive constructive notice. Instead, it held that the estate representative has an affirmative duty to protect "reasonably ascertainable creditors" by giving them actual notice of the time after which claims against the estate would be barred. Obviously, appellant would not search the courthouse records or peruse a small-town paper to see if a notice to creditors had been filed while appellant is preparing to file an appeal. The statute allows the current situation to arise with no recourse for the injured party other than the constitutional guarantee of due process which must upheld by this court.

When Adams was later appointed administrator of the then intestate estate, an entire new probate proceeding was begun. In the interest of justice and fair play, the now new administrator should have filed another notice to creditors and given petitioner personal notice to file a claim. Section 741 apparently relieves him of that responsibility and is clearly unconstitutional and it should be so ruled.

IV.

THE DECISIONS OF THE OKLAHOMA APPELLATE COURTS VIOLATE STATUTES OF THE STATE OF OKLAHOMA AS WELL AS CASE LAW

The lower courts concluded that "Unless it is proved by Appellant that she was a 'known creditor', her claim is barred forever" under Title 58 O.S. § 333 (1991).[13] In *Pope,* the hospital could not have shown that is was a known creditor without having notice that the time to file a claim was established.

Similarly, there is no way petitioner here could have made it known that she was a creditor. She did not know a publication had taken place, had no personal notice to file creditor's claim and was not compelled to search the courthouse records for a filing of notice. The phone conferences and judicial meetings listed above were more than sufficient proof that she represented Franklin prior to her death and might have a claim on the estate. Respondent has not denied and cannot deny that these conferences took place and that he was present at each.

The lower courts' decisions ignore the facts in this case in stating that there were no known creditors so publication notice was sufficient. Petitioner maintains that it was open and obvious that she was a known creditor and was entitled to actual notice without which she would be deprived her

13. The Oklahoma Statute reads in part "All claims arising upon contracts entered into prior to the decedent's death, whether the same be due, not due or contingent, must be presented on or before the presentment date as provided in the notice, and any claim not so presented is barred forever" . . . .

constitutional due process right. An Oklahoma case, *Application of Tubbs,* 620 P.2d 384 (Okla 1980), clearly states:

> A person's legally protected interests may not be adversely affected in a judicial proceeding unless a method of notification is employed which is reasonably calculated to give him knowledge at a meaningful time and in a meaningful manner of the attempted exercise of jurisdiction and an opportunity to be heard, and notice by publication alone is clearly insufficient vis-a-vis one whose name and address are either known or readily ascertainable from available sources at hand.

It is mandated at Title 58 O.S. § 331 that "Every personal representative must, . . . file notice to creditors of the decedent . . . ." "The notice to the creditors shall be given . . . by mail to all known creditors of the decedent at their respective last-known available addresses . . . ."

Since there is no doubt that respondent knew petitioner represented the deceased, petitioner was statutorily entitled to actual, personal notice to file her claim in April 1998, if the filing of the notice is found to be constitutionally valid. Since the notice was filed before the appeal time had run, petitioner maintains that the notice was premature and invalid for the reason that the statute allowing the premature filing is unconstitutional and presents an impossible problem for petitioner.

However, if the Court finds the statute is constitutional and the notice was valid based upon the statute, then petitioner should have received actual notice as mandated by statute. Lack of personal notice violates Oklahoma law.

Furthermore, prior to the June 16 hearing, appellant had filed an Ancillary Petition on May 20, 1999 asking for attorney fees. An Ancillary Petition is to be treated as any other petition and " . . . pleadings and practice therein shall be the same as if an independent action had been brought to recover upon the claim."[14] This was not done. The personal representative did not respond to the Ancillary Petition in the allotted time and no other action was taken on it until the hearing wherein it was denied. Therefore, a default judgment was asked for and should have been entered in favor of Appellant. The court ignored the statute.

It is an uncontroverted fact that the petitioner provided legal services to decedent prior to her death. Petitioner has further shown that phone calls and meetings in Judge's chambers put appellee on notice that said services were provided.

The District Court's Order and the reaffirmation by the appellate courts violated statutory and case law.

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14. Title 58 O.S. § 339 states in pertinent part

> When a claim is rejected, either by the executor or administrator, . . . the holder may bring suit as an ancillary proceeding in the probate case. . . . If suit is brought as an ancillary proceeding, . . . pleadings and practice therein shall be the same as if an independent action had been brought to recover upon the claim.

CONCLUSION

Appellant asks this Court to look at the facts and the law, both case and statutory. The premature notice in April 1998, if valid, should have been personally delivered to petitioner. Furhermore, notice should have been filed again after Adams was appointed Administrator of the intestate estate in March 1999 and said notice should have been personally served on petitioner.

Petitioner was not required by statute or case law to search the court records to determine that a creditor's claim was filed. She was deprived of her constitutional right of due process which required personal notice and, thus, was unconstitutionally deprived of a property right by not receiving actual notice either in April 1998 or March 1999.

Petitioner asks this Court to grant a Writ of Certiorari in order to uphold the Constitution of the United States as well as the Constitution of the State of Oklahoma and to finally settle the matter in the Oklahoma courts.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA, DIVISION NO. III DATED AND FILED MAY 19, 2000

IN THE COURT OF CIVIL APPEALS
OF THE STATE OF OKLAHOMA
DIVISION NO. III

Case Number 94,120

IN THE MATTER OF THE ESTATE OF
MILDRED ELIZABETH FRANKLIN,

FANNE LU YAFFE,

Appellant,

versus

JOE ADAMS,

Appellee.

APPEAL FROM THE DISTRICT COURT OF
MUSKOGEE COUNTY, OKLAHOMA
HONORABLE CARL ROBINSON, TRIAL JUDGE

* * *

OPINION

Opinion by CAROL M. HANSEN, Vice-Chief Judge:

Appellant Fanne Lu Yaffe represented Decedent Elizabeth Franklin before her death. She seeks attorney fees

for her services. A will contest developed between Adams, the nephew of Decedent, and Fulton, a cousin of Decedent. After the trial court admitted the will Adams offered for probate, Adams filed a Notice to Creditors and a Certificate of Non-Mailing which was published in the Haskell News on April 30 and May 7, of 1998. He did not mail a copy of the notice to Appellant. Fulton filed a petition in error on May 8, 1998 protesting admission of the Adams' will.

On appeal, the Court of Appeals reversed in part and disallowed both wills. On remand, Adams again filed an application to be appointed administrator of Decedent's estate, now intestate. Adams sent notice of the application to Appellant. On March 4, 1999, the trial court appointed Adams administrator. Adams filed no additional notice to creditors.

On March 8, 1999, Appellant filed her creditor's claim but Adams neither approved nor accepted it, thus was deemed denied.

Appellant filed an objection to the final accounting and an ancillary petition requesting attorney fees for her services to Decedent. At hearing on the final accounting and the combined ancillary action, the trial court denied Appellant's request and later overruled her motion to reconsider, finding her claim was time-barred and should have been filed within the time specified in the notice to creditors published in April of 1998. Appellant filed this appeal.

Appellant first argues Adams knew she was a creditor and thus should have given her notice pursuant to 58 O.S. 1991 §331. She further points out the only notice to creditors

published was premature in that the trial court's admission of the will to probate was on appeal and therefore not final.

We do not agree the notice to creditors was premature. 58 O.S. 1991 §741 provides:

> When the order or decree appointing an executor, or administrator, or guardian, is reversed on appeal for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate, performed by such executor, or administrator or guardian, if he have qualified, are as valid as if such order or decree had been affirmed.

Until reversed by the Court of Civil Appeals, Adams was the legal administrator and his action in publishing notice to creditors was lawful. *See, Pease v. Hudson*, 1945 OK 79, 157 P.2d 909.

Section 331 provides:

> . . . . . The notice to creditors shall be given by publication in some newspaper in the county in which the probate is filed once each week for two (2) consecutive weeks, and by mail to all known creditors of the decedent at their respective last-known available addresses, in accordance with Section 6 of this act.
>
> . . . . .

Unless it is proved by Appellant that she was a "known creditor", her claim is barred forever under 58 O.S. 1991

§333. A statute of nonclaims operates to destroy the debt or claim as distinguished from a statute of limitations which is a theory of withholding remedy and not a destruction of the claim or debt. *State ex rel. Central State Griffin Memorial Hospital v. Reed*, 1972 OK 14, 493 P.2d 815.

Section 331.1(A) provides:

> As used in this act, "known creditors", and related or similar references shall mean those creditors of the decedent actually known to the personal representative or reasonably ascertainable by the personal representative as of the date notice to creditors is filed. "Reasonably ascertainable creditors" shall be those whose identities, last-known addresses and claims can be determined by reasonably diligent efforts of the personal representative. If reasonable under the circumstances, such efforts shall include the personal representative's conducting a search after the decedent's death and prior to the filing of the notice to creditors, of the personal effects of the decedent.

Although operation of the nonclaims provisions results in the forfeiture of what might otherwise be meritorious claims, and the burden of pleading and proof regarding compliance with the provisions properly rests on one claiming the benefit of those provisions,[1] the record is devoid

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1. See *Hitt v. J.B. Coghill, Inc.*, 641 P.2d 211 (Alaska 1982). See *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 99 L.Ed.2d 565, 108 S.Ct. 1340 (1988); *Matter of Estate of Pope*, 1990 OK 125, 808 P.2d 640.

of any evidence addressing the question of whether Adams had actual notice of Appellant's potential claim prior to the filing of the publication notice[2]. The trial court's order found the notice to creditors was valid and that no mailing was required because there was no known claim at that time. The trial court also found Appellant had entered her appearance on behalf of the contestants and she had actual notice of circumstances sufficient to put her on notice of the notice to creditors. Appellant does not dispute this in her brief.

Having no record to the contrary, we presume the trial court's judgment to be correct. *Reeves v. Agee*, 1989 OK 25, 769 P.2d 745.

AFFIRMED

ADAMS, J., and JOPLIN, J., concur.

2. The hearing on the final account was not transcribed.

APPENDIX B — ORDER OF THE DISTRICT COURT IN AND FOR MUSKOGEE COUNTY, STATE OF OKLAHOMA DATED AND FILED DECEMBER 17, 1999

IN THE DISTRICT COURT IN AND FOR MUSKOGEE COUNTY STATE OF OKLAHOMA

CASE NO. P-97-175

IN THE MATTER OF THE ESTATE OF MILDRED ELIZABETH FRANKLIN

ORDER

This case comes on before me, the undersigned Judge upon the Motion to Reconsider filed by Fanne Lu Yaffe.

Upon reconsideration the court entered a Minute Order herein on September 3, 1999. That Minute Order is incorporated herein by reference and pursuant thereto, the Court is still of the opinion that the Motion to Reconsider should be denied.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Motion to Reconsider be denied.

s/ A. Carl Robinson
JUDGE A. CARL ROBINSON

APPENDIX C — COURT MINUTE OF THE DISTRICT COURT IN AND FOR MUSKOGEE COUNTY, STATE OF OKLAHOMA DATED SEPTEMBER 3, 1999 AND FILED SEPTEMBER 10, 1999

IN THE DISTRICT COURT IN AND FOR
MUSKOGEE COUNTY
STATE OF OKLAHOMA

CASE NO. P-97-175

IN RE: MILDRED E. FRANKLIN ESTATE

* * *

JUDGE: A. Carl Robinson

REPORTER: None

DATE: 9-3-99

COURT MINUTE

* * *

RULING/FINDING BY THE COURT:

This case came on for hearing on the final account of the administrator and objections thereto. The objection is based on the failure of the administrator to pay a claim of Mrs. Yaffe for attorney fees rendered to the decedent prior to her death. The purported will of the decedent was filed for probate on August 14, 1997 which was contested. An earlier will was admitted to probate and Letters Testamentary issued on April 15, 1998. Ms. Yaffe entered her appearance in this case on October 2, 1997 and was actively involved in those proceedings and the subsequent appeal. Notice to creditors

was filed on April 24, 1998 and an Affidavit of Non-mailing filed on April 27, 1998 on the basis of no known creditors.

An appeal was filed and the appellate court affirmed in part and reversed in part the holding of the trial court, holding that there was no valid will. Subsequently Letters of Administration were issued to the former personal representative. Ms. Yaffe filed her claim on March 8, 1999, long after the expiration of time to file claims under the original notice to creditors. No statement for such services had been previously presented.

Ms. Yaffe asserts that no mailing was made to her at the time of the original notice and that such notice was rendered ineffective by the ruling of the Court of Appeals.

The Court finds that no mailing was required because there was no known claim at that time. The court is aware of the provisions of Title 25, Section 13 of the Oklahoma Statutes which provides that "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself". This statute applies equally to the personal representative and to the claimant. Since Ms. Yaffe had entered her appearance, on behalf of contestants, in the probate case, took an active part and received copies of pleadings, she had actual notice of circumstances sufficient to put her on notice of the notice to creditors. The personal representative, on the other hand, had no reason to believe a claim would be filed by her because she did enter her appearance in the case and had never, by letter, or in any

other way indicated to the personal representative that she had a claim for services to the decedent.

In Title 58, Section 741 it is provided that "When the order or decree appointing an executor, or administrator, or guardian, is reversed on appeal for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate, performed by such executor . . . , if he have qualified, are as valid as if such order or decree had been affirmed." This case was reversed on appeal for error and not for want of jurisdiction of the court.

In the case of In Re Estate of Truskey, 445 P.2d 782, the court discussed the "stay" statutes with reference to appeals from the county court to the district court. The statutes with reference to such appeals have been repealed, however, the "stay" statutes remain in effect. The court held that "the filing of notice of appeal to the district court from an order of the county court admitting a will to probate, together with proper appeal bond, by one entitled to appeal from such order . . . stays the order . . . admitting a will to probate". Title 12, Sections 968 to 974 have provisions for the stay of judgments by filing a bond or by order of the court in selected cases. No appeal bond was filed in this case and the file contains no record of a stay granted by the trial judge.

The Court therefore finds that the Notice to Creditors was valid and effective and the claim of Ms. Yaffe is barred. The objections to the final account are overruled and the final account is approved.

s/ A. Carl Robinson
Judge A. Carl Robinson

APPENDIX D — ORDER OF THE SUPREME COURT OF THE STATE OF OKLAHOMA DENYING PETITION FOR CERTIORARI DATED AND FILED SEPTEMBER 20, 2000

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Wednesday, September 20, 2000

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

* * *

94,120 In the Matter of the Estate of Mildred Elizabeth Franklin.
Fanne Lu Yaffe v. Joe Adams.

Petition for certiorari is denied.

CONCUR: Hargrave, V.C.J., Hodges, Lavender, Boudreau, JJ., Lile, SJ.

DISSENT: Opala, Kauger, Watt, Winchester, JJ.

DISQUALIFIED: Summers, C.J.

* * * *

APPENDIX E — ORDER OF THE SUPREME COURT OF THE STATE OF OKLAHOMA DATED AND FILED NOVEMBER 6, 2000

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Monday, November 6, 2000

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

94,120 In the Matter of the Estate of Mildred Elizabeth Franklin.
Fanne Lu Yaffe v. Joe Adams.

The court declines to consider application to publish opinion filed after mandate was properly issued on October 12, 2000.

* * * *

s/ Hardy Summers
CHIEF JUSTICE